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In The

Supreme Court of the United States

Number 810.

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION, PETITIONER,

V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

REPLY BRIEF OF PETITIONER FOR WRIT OF CERTIORARI.

MAX KIER,
Counsel for Petitioner.

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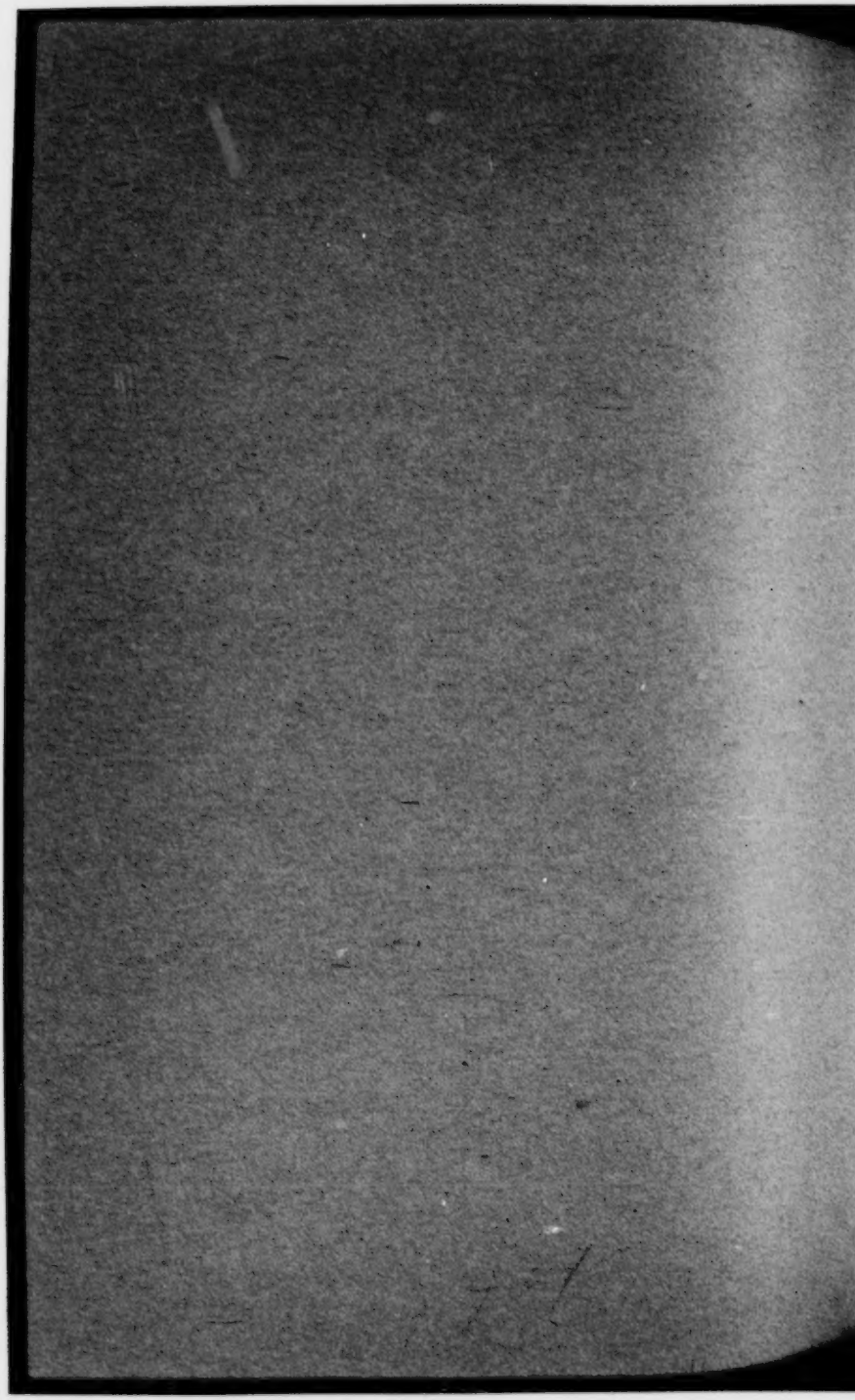

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Number 310.

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V.

C. RUSSELL MATTSON, ADMINISTRATOR OF THE ESTATE OF WILLIAM BREHM, DECEASED, AND THE SCHOOL DISTRICT OF THE CITY OF LINCOLN, RESPONDENTS.

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MAX KIER,
Counsel for Petitioner.

STATEMENT.

This reply brief is made necessary because of the apparent misunderstanding and misconception by the respondent as to the bases for petitioner's application. For purposes of clarification and proper understanding, some restatement of petitioner's position seems indicated.

OPINION BELOW.

The opinion below is now reported in advance sheets 174 F. (2d) 215.

JURISDICTION.

Jurisdiction is sought to be invoked by the petitioner for the reasons that; (1) That the Court of Appeals in the case at bar applied a rule in its ascertainment of the local law which is contradictory and in conflict with that of other United States Courts of Appeals, and (2), for the reason that the Court of Appeals in the case at bar has mistaken and misapplied the law of the state of Nebraska.

Respondent argues, apparently, that lack of jurisdiction exists to entertain this application. Respondent contends that the conflict between the United States Courts of Appeals has no pertinence for the reason that the matter involved is controlled by local law. The respondent argues further that the Court of Appeals in the instant case did not determine the state of the local law, but merely applied it. These several answers will be considered fully in sections of this brief devoted to argument. At this point it is appropriate, however to observe that conflict between the several courts of appeals as to matters within their cognizance is a sufficient reason for granting certiorari.

Rogers v. *Helvering*, 320 U. S. 410, 88 L. Ed. 134, 64 S. Ct. 172.

St. Paul Mercury & Indemnity Co. v. *Red Cab*, 303 U. S. 283, 82 L. Ed. 845, 58 S. Ct. 586.

Stelos Company v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 79 L. Ed. 1414, 55 S. Ct. 746.

It may further be observed at this point that this court may grant a writ of certiorari, and should do so, where the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

Cities Service Co. v. *Dunlop,* 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201.

Rorick v. *Devon Syndicate,* 307 U. S. 299, 83 L. Ed. 1302, 59 S. Ct. 877.

Rosenthal v. *N. Y. Life Ins. Co.,* 304 U. S. 263, 82 L. Ed. 1330, 58 S. Ct. 874.

Lauf v. *G. Shinner & Co.,* 303 U. S. 323, 82 L. Ed. 872, 58 S. Ct. 578.

Alice State Bank v. *Houston Posture Co.,* 247 U. S. 240, 62 L. Ed. 1096, 38 S. Ct. 496.

STATEMENT OF THE CASE.

Petitioner specifically denies the statement contained in respondent's brief under the caption, "Statement of the Case" to the effect that it is a permissive inference from the record that the service pipe which allowed gas to escape had a serviceable life of from 10 to 15 years. Petitioner further denies specifically respondent's statement that the record and evidence admits of the inference that the service line was at all times accessible, open and available to inspection. Such statements of fact were not found by the trial judge to be warrantable inferences from the record, and if indulged in by the Court of Appeals was made without proper deference and consideration to the factual findings of the trial court. We submit the doctrine of *Maggio* v. *Zietz,* 333 U. S. 56, 92 L. Ed. 476, 68 S. Ct., 401, to be applicable to the situation before the court in the case at bar:

> "Deference of an appellate court to the trial court's finding of fact presupposes that the trier of fact did not merely apply some supposed rule of law but exercised his judgment * * *. In reviewing a judgment of the district court, a circuit court of appeals may not make an independent evaluation of the evidence but is limited to a consideration of the justifiability of the district court's findings on the case in the record before it."

It is submitted, however, that viewing the evidence in the light as stated by respondent, and giving to the respondent every reasonable intendment and inference from their factual statement, that the law of the State of Nebraska properly determined, does not justify the submission of this case to a jury, and does not furnish any possible basis for liability.

ARGUMENT.

I.

Specification of Error Number 1.

Petitioner's first specification of error was that the Court of Appeals in the case at bar felt constrained in ascertaining the State of Nebraska law to have regard for, and give consideration to data, inferences and implications from the Nebraska decisions without respect as to whether such decisions considered situations analogous or comparable to that of the case at bar. Petitioner asserts that Courts of Appeals in other circuits have held that it is wrong and improper to speculate as to the state of the local law and that in the absence of a direct or pertinent local decision, that a weighted and analytical determination of the law is to be made. The respondent appears to argue that

no conflict exists between the several courts of appeals and that in any event the matter is one controlled by the local law. That a conflict exists between the several courts of appeals may be almost conclusively demonstrated. In the case at bar the Court of Appeals held that in the ascertaining of the Nebraska law, it was bound by the doctrine of *Yoder* v. *Nu-Enamel,* 117 F. (2d) 488. In that case the Court of Appeals for the eighth circuit said:

> "Where direct expression by authorized state tribunal is lacking, it is the duty of the federal court, in dealing with matters of either common law or statute, to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. Having any convincing manifestation of local law a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference should accordingly be given appropriate heed."

As opposed and in decided conflict with this doctrine is the Court of Appeals for the fourth circuit as indicated by *New England Mut. Life Ins. Co.* v. *Mitchell,* 118 F. (2d) 414.

> "The respectful attitude toward the local courts where there has been no decision on the precise question before us is to consider the question in the light of the common law of the state with a view of reaching the decision which reason dictates and with the faith that the local court will reach the same decision when the question comes before it. To base a decision upon dicta or upon speculation as to what the local court may decide in the light of dicta would be to depart from

> our solemn duty in the premises and to embark upon a vain and illusory enterprise."

In *Van Denbark* v. *Owens Illinois Glass Company*, 110 Fed. (2d) 310, the Court of Appeals for the seventh circuit held:

> "The Federal courts have an independent jurisdiction in administration of state laws co-ordinate with and not in subordination to that of state courts and are bound to exercise their own judgment as to the meaning and effect of those laws where interpretation has not been settled by definitive decisions by the state courts."

Other citations from other courts of appeals have been set forth in petitioner's original brief. These citations clearly establish that a conflict does exist between various of the United States courts as to their function and procedure in their ascertainment of the local law. The Court of Appeals in the case at bar has taken the position that the respondent is entitled to have his case submitted to a jury if there is any expression by the Nebraska court which can be strained or stretched to include respondent's theory of liability. The Court of Appeals in the case at bar has not found it necessary or needful to analyze all of the Nebraska holdings or to make a weighted determination of the Nebraska law, but merely to ascertain whether any expression of the Nebraska court can be found conforming in any respect to respondent's theory for the imposition of liability. This case therefore is an apt one to determine the conflict that exists between the various courts of appeals. Is it the duty of the federal court in a diversity case to make a qualitative analysis of the local law, or is its function discharged when

it allows a jury to impose liability based upon a wholly speculative ascertainment of the local law? The matter presented by this petition is one entirely within the cognizance of the federal courts and one upon which there exists a considerable diversity of judicial opinion. The ends of public policy make the resolution of this controversy appropriate.

We would believe it to be manifest that the methods and procedures to be employed by the United States courts in the ascertainment of the local law to be entirely a matter for the federal courts to determine. Since respondent contends that the question involved is one purely of local law, it is proper to note that the Supreme Court of Nebraska has noted and declared that it is not bound by, nor need it give any deference to previous opinions, statements and declarations which are not in the nature of precedent.

City of Lincoln v. *Steffensmeyer,* 134 Neb. 613.
Yoder v. *Nu-Enamel,* 140 Neb. 585.

Specification Number II.

Petitioner's specification number II is to the effect that the Court of Appeals in its review of this cause failed to give proper consideration to the conclusions and deliberations of the trial judge as to the state of the local law. Petitioner's original brief contains explicit references to the analyses as made by the trial judge, and demonstrates that the trial judge did analyze the state of the local law and did apply to the situation presented, the Nebraska law as it was found from a weighted consideration of the Nebraska decisions. The answer of the respondent in nowise con-

travenes this contention. The Court of Appeals took the view that the trial judge made his findings as to the state of the local law without reference to and independent of the Nebraska decisions. This position is clearly untenable and a reading of the oral opinion delivered by the trial judge, together with his several written memoranda demonstrates that the trial judge was scrupulous and meticulous in his analysis of the Nebraska cases, and in his application of those decisions to the situation presented. The answer of the respondent does not maintain the position or view so expressed by the Court of Appeals, and it is therefore logically inferable that respondent admits that the Court of Appeals was in error in its statement that the trial court did not "purport to follow or be influenced by any adjudication of the Supreme Court of Nebraska." In fact, the answer brief of the respondent expressly admits that the various opinions delivered by the district court "persuasively and conclusively indicated that it did apply the decisions of the Supreme Court of Nebraska" (p. 18, Brief of Respondent).

In the consideration therefore, of this specification of error we may now start with the concession that the trial judge in ascertaining the local law, considered and applied the decisions of the Supreme Court of Nebraska. The holding of the Court of Appeals does not purport to be guided or influenced by the ascertainment of the trial judge. In this, it is submitted, the intermediate federal court committed error. It seems quite settled that the conclusions of the district court sitting in the state is entitled to be given a special consideration in its determinations of the

local law. In *Gardner* v. *New Jersey*, 329 U. S. 566, 91 L. Ed. 504, 67 S. Ct. 467, this court said expressly:

> "Construction of state law by a judge of the federal court sitting in the state is entitled to special weight."

The Court of Appeals, in its review of this case, did not give any weight to the considerations and conclusions of the trial judge, but embarked upon an excursion of its own. The situation now existing in that a diversity of opinion exists among the federal judges who have considered this case as to the state of the local law, would appear to offer ample basis for the granting of a writ of certiorari.

Specification Number III.

Petitioner's specification of error number III is to the effect that the Court of Appeals erroneously determined that the law of the state of Nebraska imposes a duty of inspection and maintenance of private service pipes upon a supplier of gas in the absence of notice or knowledge of a defective condition existing therein. In the maintenance of this specification, petitioner noted that under the general rule almost universally regarded, a supplier of natural gas has no duty with reference to installations upon the premises of its consumers in the absence of duty of inspection or maintenance having expressly been undertaken or in the absence of notice or knowledge of a defective condition existing. Petitioner argues in its original brief that the Supreme Court of Nebraska has made reference to the various cases, precedents and authoritative material which are expressive of the general rule and that

therefrom a logical inference arises that Nebraska has adopted and follows the general rule. The brief of the respondent makes the contention that the weight and majority of the jurisdictions do not support the foregoing as a statement of the general rule. This contention is made without the dignity of a single supporting citation and without reference to any adjudicated case. As indicative of the general rule reference is made to 38 C. J. S. 734, Section 420:

> "If leaks or defects in the company's pipe occur because of faulty construction or otherwise through the company's fault, it is liable without notice for any resulting injuries to persons or property * * * but where the defect or break in the pipes is caused, not by negligence of the gas company, but by the act of a third person or through natural causes and where the company had used due care in inspecting its pipes to discover defects therein, liability does not attach until the company has had notice and a reasonable time to repair."

The general rule, we submit, was specifically followed by the Nebraska Supreme Court in the case of *Clough* v. *North Central Gas Company*, 150 Neb. 418. In view of the specific reference by the Nebraska Supreme Court in *Clough* v. *North Central Gas Company*, to the general rule and to the precedents expressing the general rule, there would seem to be some burden imposed upon the respondent of pointing out wherein the Nebraska court has departed or diverted from the general rule. The brief of respondent is conspicuous in its failure to make any such argument, explanation or analysis.

Specification IV.

Petitioner's fourth and final specification of error is that the Court of Appeals in its review of this cause wholly ignored settled decisions and doctrine of the State of Nebraska in its review of this case. The Court of Appeals, it is submitted, would allow liability to be imposed upon the petitioner for defect in the service pipe upon the basis that the company should have known of the defective condition of such pipe without a showing that the company did in fact have actual notice of such condition. It is submitted that this specification is crucial to petitioner's application. The brief of the respondent concedes that the Court of Appeals in its review did arrive at a determination that the law of the State of Nebraska would justify the imposition of a tort liability upon the petitioner, upon the basis of constructive notice being imparted to the petitioner of the state of the service pipe in question. The respondent argues, however, that such a determination of the Nebraska law is proper and that the decisions noted in petitioner's original brief are not in conflict with this asserted rule of law. This, then, presents a clear cut issue and the inferences from the resolution thereof are obvious. If the decisions contained in petitioner's original brief establish the Nebraska rule to be that in the event of a latent defect, liability for tort cannot be imposed in the absence of actual knowledge being imparted of such defect, then there has been a plain divergence by the Court of Appeals from the local law. Such misapprehension of the local law clearly having influenced the Court of Appeals in its review would, if established, warrant the allowance of writ of certiorari, proper and neces-

sary to bring about a correction. It is indispensable, therefore, to a determination of this application that it be determined whether or not the decisions referred to and set forth in petitioner's initial brief establish the rule to be that in Nebraska, liability for latent defect is dependent upon actual knowledge of the existence of the defect.

In the consideration of the several decisions contained in petitioner's original brief, it may be noted in the first instance that the Court of Appeals did not even make reference thereto and did not attempt an analysis or explanation thereof. We may assume, therefore, that the Court of Appeals in its determinations was not influenced, guided or controlled by these decisions. Yet, however, there is no suggestion in the brief of respondent that these cases and precedents do not hold that tort liability in Nebraska is predicated upon knowledge. The brief of respondent does not assail the conclusions which petitioner draws from these several cases, but argues that the holdings and rules therein contained are not applicable to the present situation. It would appear therefore, that the Court of Appeals in failing to comment upon these decisions did not even draw to its aid all of the Nebraska authority. We submit that no reasoned determination of the law of the State of Nebraska on this subject can be made without an analysis of the cases referred to in petitioner's brief (pages 24 to 27).

The respondent undertakes the task of distinguishing these several cases. The first attempted line of distinction is that the cases involving governmental subdivisions are peculiar to cities and villages in Nebraska,

and establish simply the rule to be that when governmental subdivisions are acting in a governmental capacity that negligence is predicated only upon a showing of actual knowledge. It is vigorously asserted that no such distinction was indulged in by the cases and that no such conclusion is tenable from these decisions. These several cases (*Gates* v. *City of North Platte*, 126 Neb. 785; *City of Omaha* v. *Kochem*, 74 Neb. 718; *Struble* v. *Village of DeWitt*, 81 Neb. 504; *Hashberger* v. *City of Schuyler*, 115 Neb. 639) involved actions for obstructions, defects and obstacles in streets, sidewalks and public places. The important principle to be borne in mind, however, is that in Nebraska, governmental subdivisions are not relieved from liability with reference to the proper maintenance of streets and sidewalks by reason of the fact that such subdivisions are acting in a governmental capacity. In Nebraska, political subdivisions, and particularly cities and villages are responsible for the condition of streets and sidewalks by reason of statute and because the maintenance of streets and sidewalks is one of the burdens which the governmental subdivision assumes and undertakes (*City of Omaha* v. *Olmstead*, 5 Neb. 446; *Cushman Motor* v. *City of Lincoln*, 97 Neb. 519; *Hanley* v. *Fire Proof Building*, 107 Neb. 544; *Chaney* v. *Village of Riverton*, 104 Neb. 189; *Bowman* v. *City of Omaha*, 59 Neb. 84). It is stated explicitly in *Hanley* v. *Fire Proof Building Company*:

> "The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public * * *."

In other words, these cases cited in petitioner's brief were general negligence actions and were determined by general negligence rules as found and established to exist by the Supreme Court of Nebraska. The decisions noted did not go off on any distinction between governmental and proprietory capacity but were resolved under the general rules of negligence liability existing in Nebraska. Under those decisions the doctrine of constructive notice of the existence of a latent defect does not exist in Nebraska and the Court of Appeals was in grievous error in its reliance upon the doctrine of constructive notice.

With reference to *Knies* v. *Lang*, 116 Neb. 387, the brief of respondent again attempts to make a wholly unwarranted distinction. Respondent urges that in the latter case a cause intervened for which the defendant could not be liable. We assert that the case did not turn upon the existence of a supervening or intervening cause and that there is no indication by the Supreme Court of Nebraska in its resolution of that case, that the defendant was relieved of liability because of an intervening cause. The several cases contained in petitioner's initial brief are all instances in which liability was sought to be imposed by reason of latent conditions involving apparatus which had become deteriorated due to natural causes. In all of those cases the Supreme Court of Nebraska was definite and explicit that in the absence of actual notice there can be no liability for failure to discover the existence of a defect. We submit that the Court of Appeals could not make a determination of the law of the State of Nebraska without a consideration of the several

cases cited, referred to and commented upon under specification IV of petitoner's brief. We submit that the Court of Appeals, in its review of this cause in finding that the law of the State of Nebraska warrants a submission of the liability of this respondent based upon the doctrine of constructive notice of the existence of latent defect is in plain disregard of the settled decisions of the State of Nebraska.

CONCLUSION.

We are constrained to observe that respondent's brief is compounded of confusion, misunderstanding and misinterpretation. We submit that the Court of Appeals, in its review of this cause failed to accord deference to the conclusions and findings of the trial court, misapprehended the state of the Nebraska law and arrived at a determination of the existence of the Nebraska law without a consideration of the pertinent decisions of that state and in disregard thereof. A proper respect for decisions of the State of Nebraska and a proper regard for a considered and just determination of this cause necessitates the granting of petitioner's application for writ of certiorari.

Respectfully submitted,

CENTRAL ELECTRIC AND GAS COMPANY, A CORPORATION,
Petitioner,

MAX KIER,
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